

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA**

<b>IN THE MATTER OF THE GRAIN DEALER'S</b>	)	<b>PROPOSED FINDINGS OF</b>
<b>BOND OF AGRIBIOTECH, INC.</b>	)	<b>FACT AND CONCLUSIONS</b>
	)	<b>OF LAW AND DECISION OF</b>
	)	<b>RECEIVER</b>
	)	<b>GD01-002</b>
	)	<b>(Civ. 01-0447)</b>

On August 2, 2001, the Public Utilities Commission (Commission) filed with the Third Judicial Circuit a Petition to Appoint South Dakota Public Utilities Commission as a receiver of AgriBioTech, Inc. (ABT) pursuant to SDCL 49-45-16 and SDCL Chapter 21-21, to take possession of the cash proceeds of the grain dealer's bond commencing July 1, 1999, and ending June 30, 2000, with St. Paul Fire & Marine Insurance Company, being the surety. On August 29, 2001, the Commission was appointed receiver by the Honorable Judge Ronald K. Roehr of the Third Judicial Circuit of South Dakota.

ABT filed for Chapter 11 bankruptcy in the United States Bankruptcy Court for the District of Nevada on January 25, 2000. The Commission filed a Motion for Relief from Automatic Stay which was granted by the bankruptcy court by order dated June 18, 2001.

A hearing was held on the claims against the \$50,000.00 grain dealer's bond, as described above, on November 1, 2001, beginning at 1:00 p.m., at the Stony Point Meeting Room, in the Ramkota Hotel, 1901 9th Ave. S.W., Watertown, South Dakota. The only person testifying was Bob Knadle, Director of the Transportation/Warehouse Division of the Commission, hereafter referred to as Commission Staff or Staff. At the end of the hearing, Commission Staff asked that the record be kept open because Staff had received information that approximately 15 patrons of ABT may be subject to a demand by the Creditor Trustee for the return of money paid to them by ABT for grain because the Creditor Trustee considered the payments to be preferential transfers under the bankruptcy code. Staff explained that some of the affected patrons were not on the Commission's mailing list giving notice of the hearing because they were not owed any money for grain. The Commission granted Staff's request and kept the record open.

On September 6, 2002, the Commission received Staff's Motion to Receive Evidence. In the motion, Staff stated that, since the hearing, five additional claims were submitted based on the claimants' settlements with the Creditor Trustee of payments that were alleged by the Creditor to be preferential transfers. The last claim was received on August 15, 2002. Staff asked that the Commission receive the claims into the record. At its October 17, 2002, meeting, the Commission considered Staff's motion to receive the additional claims into evidence. No one objected to the motion. The Commission granted the motion. In addition, the Commission voted to accept Staff's recommendations concerning the validity and amount of each claim, including the claims received into evidence after the hearing, and accepted Staff's recommendations regarding the distribution of the bond proceeds. The Commission found that the claims against the bond covering the period of July 1, 1999, through June 30, 2000, should be distributed based on Staff's recommendations regarding the amount and validity of each claim, on a pro rata basis, including accrued interest.

Based on the evidence of record, the Commission makes the following proposed findings of fact and conclusions of law:

## **PROPOSED FINDINGS OF FACT**

1. On August 2, 2001, the Commission filed with the Third Judicial Circuit a Petition to Appoint South Dakota Public Utilities Commission as a receiver of ABT pursuant to SDCL 49-45-16 and SDCL Chapter 21-21, to take possession of the cash proceeds of the \$50,000.00 grain dealer's bond commencing July 1, 1999, and ending June 30, 2000, with St. Paul Fire & Marine Insurance Company, being the surety. On August 29, 2001, the Commission was appointed receiver by the Honorable Judge Ronald K. Roehr of the Third Judicial Circuit of South Dakota.
2. ABT filed for Chapter 11 bankruptcy in the United States Bankruptcy Court for the District of Nevada on January 25, 2000. The Commission filed a Motion for Relief from Automatic Stay which was granted by the bankruptcy court by order dated June 18, 2001.
3. The Commission scheduled a hearing to receive evidence of claims against the bond. The hearing was held as scheduled on November 1, 2001, beginning at 1:00 p.m., at the Stony Point Meeting Room, in the Ramkota Hotel, 1901 9th Ave. S.W., Watertown, South Dakota. Potential claimants were mailed a copy of the notice of hearing and notice was published in the Watertown Public Opinion and the Sioux Falls Argus Leader. TR. at 11. All of the claims submitted to the Commission were entered into the record. Exhibit 1.
4. Wishek Farmers Elevator submitted a claim for \$12,631.05 for rye. Exhibit 1B. Based on company records, Commission Staff supported this amount. TR. at 15. The Commission finds that the claimant has a valid claim for \$12,631.05.
5. Farmland Atwood submitted a claim for \$4,922.30 for millet. Exhibit 1C. Based on company records, Commission Staff supported this amount. TR. at 16. The Commission finds that the claimant has a valid claim for \$4,922.30.
6. North Pacific Trading submitted a claim for \$25,245.00 for nyger seed. Exhibit 1D. Based on company records, Commission Staff supported this amount. TR. at 16. The Commission finds that the claimant has a valid claim for \$25,245.00.
7. Vincent Ries submitted a claim for \$1,443.37 for rye, \$5.00 for a bank handling fee, and attorney fees. Exhibit 1E. Based on company records, Commission Staff supported the \$1,443.37 for the rye. TR. at 16. Commission Staff did not recommend payment of the \$5.00 bank handling fee or attorney fees on the basis that these claims are not covered by the bond which is for the specific purpose of grain purchases. *Id.* The Commission agrees that a bank handling fee and attorney fees are not covered by the bond and finds that the claimant has a valid claim for \$1,443.37.
8. Hittle Trucking submitted a claim for \$4,189.53 for rye. Exhibit 1F. Based on company records, Commission Staff supported this amount. TR. at 16-17. The Commission finds that the claimant has a valid claim for \$4,189.53.
9. Minnerath Farms submitted a claim for \$83,074.09 for rye and oats. Exhibit 1G. Based on company records, Commission Staff supported this amount. TR. at 17; Exhibit 3A. The Commission finds that the claimant has a valid claim for \$83,074.09.
10. Douglas Bandemer submitted a claim for \$411.96 for rye. Exhibit 1H. Based on company records, Commission Staff supported this amount. TR. at 17. The Commission finds that the

claimant has a valid claim for \$411.96.

11. TBS Brokers submitted a claim for \$6,785.74 for rye. Exhibit 1I. Based on company records, Commission Staff supported this amount. TR. at 17. The Commission finds that the claimant has a valid claim for \$6,785.74.

12. Randy Hausvik (Spink County FSA/ Farmers State Bank of Turton as lienholders) submitted a claim for \$3,227.66 for rye. Exhibit 1J. Based on company records, Commission Staff supported this amount. TR. at 18. The Commission finds that the claimant has a valid claim for \$3,227.66.

13. Vanderveen Commodity Service LTD submitted a claim for \$16,665.89 for rye. Exhibit 1K. Based on company records, Commission Staff supported this amount. TR. at 18; Exhibit 3B. The Commission finds that the claimant has a valid claim for \$16,665.89.

14. Green Thumb Commodities submitted a claim for \$600.00 for sunflowers and \$14.00 for pallets. Exhibit 1L. Based on company records, Commission Staff supported an amount of \$600.00 for the sunflowers. TR. at 18. Staff recommended disallowance of the \$14.00 for pallets because pallets are not covered by the bond which is for the specific purpose of grain purchases. *Id.* The Commission agrees with Staff and finds that the claimant has a valid claim for \$600.00.

15. David Hulscher submitted a claim for \$7,878.88 for oats. Exhibit 1M. Based on company records, Commission Staff supported this amount. TR. at 19; Exhibit 3C. The Commission finds that the claimant has a valid claim for \$7,878.88.

16. Gary Theisen (Farm Credit Services as lienholder) submitted a claim for \$364.46 for rye. Exhibit 1N. Based on company records, Commission Staff supported this amount. TR. at 19; Exhibit 3D. The Commission finds that the claimant has a valid claim for \$364.46.

17. Paul Theisen (Farm Credit Services as lienholder) submitted a claim for \$735.91 for rye. Exhibit 1O. Based on company records, Commission Staff supported this amount. TR. at 19; Exhibit 3E. The Commission finds that the claimant has a valid claim for \$735.91.

18. Berlin Farmers Elevator submitted a claim for \$13,583.81 for rye. Exhibit 1P. Based on company records, Commission Staff recommended a claim of \$13,397.26. TR. at 19; Exhibit 3F. Staff explained that the difference of \$186.55 was due to dockage. *Id.* The Commission agrees with Staff's recommendation and finds that the claimant has a valid claim for \$13,397.26.

19. Claire Orthaus submitted a claim for \$850.00 for soybeans. Exhibit 1Q. Based on company records, Commission Staff recommended a claim of \$778.15. TR. at 20; Exhibit 3G. The Commission agrees with Staff's recommendation and finds the claimant has a valid claim for \$778.15.

20. Amkota Coop submitted a claim for \$90,781.25 for sunflowers and milo. Exhibit 1R. Based on company records, Commission Staff supported this amount. TR. at 20. The Commission finds that the claimant has a valid claim for \$90,781.25.

21. Burton Hoovestol submitted a claim for \$8,056.94 for oats. Exhibit 1S. Based on company records, Commission Staff recommended a claim of \$8,045.96. TR. at 20; Exhibit 3H. Staff stated the slight difference in the numbers is due to the amount of bushels. TR. at 20. The Commission

agrees with Staff's recommendation and finds that the claimant has a valid claim for \$8,045.96.

22. Dakota Mill & Grain submitted a claim for \$17,446.04 for millet and safflowers. Exhibit 1T. Based on company records, Commission Staff recommended a claim of \$15,384.62. TR. at 21; Exhibit 3I. Staff stated that the difference was due to dockage of \$806.41 and a mathematical error of \$1,255.01 on Dakota Mill & Grain's claim form. TR. at 21. The Commission agrees with Staff's recommendation and finds that the claimant has a valid claim for \$15,384.62.

23. Kuecker Seed Farm submitted a claim for \$15,914.60 for certified sharp wheat and rye. Exhibit 1U. Based on company records, Commission Staff recommended a claim of \$12,519.26. TR. at 21-22. The difference in the amount was due to Staff's recommended disallowance of the \$3,395.34 for certified sharp wheat. TR. at 22. Commission Staff stated that the certified sharp wheat is not included in the definition of grain and is, therefore, not covered by the bond. TR. at 21-22. The Commission agrees that the certified sharp wheat is not grain as defined by SDCL 49-45-1.1(2) which excludes "grain that has been cleaned, processed and specifically identified for intended use of planting for reproduction and for which a grain warehouse receipt has not been issued." The Commission finds that the claimant has a valid claim for \$12,519.26.

24. South Shore Elevator submitted a claim for \$17,146.47 for rye, canola, and buckwheat seed. Exhibit 1V. Based on company records, Commission Staff recommended a claim of \$10,900.83. TR. at 22-23; Exhibit 3J. The difference in the amount was due to Staff's recommended disallowance of the \$6,245.64 for buckwheat seed. TR. at 22. Commission Staff stated that buckwheat seed is not included in the definition of grain and is therefore not covered by the bond. TR. at 22-23. The Commission agrees that buckwheat seed is not grain as defined by SDCL 49-45-1.1(2) which excludes "grain that has been cleaned, processed and specifically identified for intended use of planting for reproduction and for which a grain warehouse receipt has not been issued." The Commission finds that the claimant has a valid claim for \$10,900.83.

25. Charles Olson submitted a claim for \$3,854.50 for certified jerry oats. Exhibit 1W. Commission Staff recommended that the entire claim be disallowed because certified jerry oats are not included in the definition of grain and are, therefore, not covered by the bond. TR. at 23; Exhibit 3K. The Commission agrees that certified jerry oats are not grain as defined by SDCL 49-45-1.1(2) which excludes "grain that has been cleaned, processed and specifically identified for intended use of planting for reproduction and for which a grain warehouse receipt has not been issued." The Commission finds that the claimant does not have a valid claim.

26. Byrl Logan submitted a claim for \$6,307.69 for rye, plus \$166.00 of interest. Exhibit 1X. Commission Staff recommended that the entire claim be disallowed because the sale of the rye was subject to a deferred payment contract dated March 3, 1999. TR. at 24. Staff stated that deferred payment contracts are not protected by the bond under South Dakota law. The Commission agrees that deferred payment contracts are not covered by the bond. Pursuant to SDCL 49-45-9, a grain dealer's bond "may not benefit any person entering into a voluntary credit sale with a grain dealer." A voluntary credit sale is defined as "a sale of grain or seeds pursuant to which the sale price is to be paid more than thirty days after the delivery or release of the grain for sale, including those contracts commonly referred to as deferred-payment contracts, deferred-pricing contracts and price-later contracts." SDCL 49-45-1.1(5). Thus, deferred payment contracts are statutorily excluded from bond coverage and the Commission finds that the claimant may not receive any of the bond proceeds.

27. Jay Grinols submitted a claim for \$2,557.19 for oats. Exhibit 1Y. Based on company records, Staff recommended a claim for \$1,967.07. TR. at 24; Exhibit 3L. The Commission agrees with Staff's recommendation and finds that the claimant has a valid claim for \$1,967.07.

28. At the end of the hearing, Commission Staff asked that the record be kept open because Staff had received information that approximately 15 patrons of ABT may be subject to a demand for the return of money paid for grain under the theory that the payment was a preferential transfer under the bankruptcy code. TR. at 26. Some of the affected patrons were not on the Commission's mailing list giving notice of this bond proceeding because they were not owed any money for grain. *Id.* Staff stated that "[d]epending on the outcome of this issue there may be additional claims on the bond." *Id.* at 26-27. The Commission kept the record open.

29. On September 6, 2002, the Commission received Staff's Motion to Receive Evidence. In the motion, Staff stated that, since the hearing, five additional claims were submitted based on the claimants' settlements with the Creditor Trustee of payments that were alleged by the Creditor to be preferential transfers. Staff asked that the Commission receive the claims into the record. On October 17, 2002, the Commission considered Staff's motion to receive the additional claims into evidence. No one objected to the motion. The Commission granted the motion.

30. As explained in the motion, Amkota Coop filed a claim with the Commission on February 22, 2002, for \$5,000.00 as a settlement of alleged preferential transfers in the amount of \$63,322.54 for sunflowers and milo, and trucking costs of \$5,411.95, during the period of October 12, 1999, to November 19, 1999. Exhibit 10. Based on company records, Commission Staff recommended that Amkota Coop has a valid claim in the amount of \$5,000.00 for the settlement of the preferential transfer issue relating to the grain sales. The Commission agrees with Staff's recommendation and finds that the claimant has a valid, additional claim of \$5,000.00.

31. Knight Seed Company, Inc. filed a claim with the Commission on May 21, 2002, for \$1,000.00 as a settlement of alleged preferential transfers in the amount of \$7,838.00 for canary, peas, sunflowers, flax, canola, and oats, and for pallets in the amount of \$150.00, delivered on October 22, 1999. Exhibit 11. Based on company records, Commission Staff recommended that Knight Seed Company, Inc. has a valid claim in the amount of \$1,000.00 for the settlement of the preferential transfer issue relating to the grain sales. The Commission agrees with Staff's recommendation and finds that the claimant has a valid claim of \$1,000.00.

32. Rolling Prairie Grain Company, Inc. filed a claim with the Commission on June 5, 2002, for \$500.00 as a settlement of alleged preferential transfers in the amount of \$4,819.30 for rye delivered on November 22, 1999. Exhibits 13, 14. Based on company records, Commission Staff recommended that Rolling Prairie Grain Company, Inc. has a valid claim in the amount of \$500.00 for the settlement of the preferential transfer issue. The Commission agrees with Staff's recommendation and finds that the claimant has a valid claim of \$500.00.

33. Wishek Farmers Elevator filed a claim with the Commission on June 28, 2002, for \$2,000.00 as a settlement of alleged preferential transfers in the amount of \$7,146.51 for rye delivered during the period of November 12-15, 1999. Exhibit 15. Based on company records, Commission Staff recommended that Wishek Farmers Elevator has a valid, additional claim in the amount of \$2,000.00 for the settlement of the preferential transfer issue. The Commission agrees with Staff's recommendation and finds that the claimant has a valid, additional claim of \$2,000.00.

34. Lone Prairie Grain, Inc. filed a claim with the Commission on August 15, 2002, for \$350.00 as

a settlement of alleged preferential transfers in the amount of \$4,861.59 for rye delivered on November 10 and 11, 1999. Exhibit 16. Based on company records, Commission Staff recommended that Lone Prairie Grain, Inc. has a valid claim in the amount of \$350.00 for the settlement of the preferential transfer issue. The Commission agrees with Staff's recommendation and finds that the claimant has a valid claim of \$350.00.

#### **PROPOSED CONCLUSIONS OF LAW**

1. The Court has jurisdiction over this matter pursuant to SDCL 49-45-16, and SDCL Chapter 21-21.
2. The Commission has jurisdiction over this matter as a receiver appointed by the Court pursuant to SDCL Chapter 21-21, and SDCL Chapter 49-45, specifically 49-45-16.
3. All of the above claims found valid by the Commission are legitimate claims on the proceeds of the \$50,000.00 grain dealer's bond, commencing July 1, 1999, and ending June 30, 2000. All such claims shall be paid out of the proceeds of the bond on a pro rata basis, along with accrued interest.

It is therefore

ORDERED, that if these findings of fact and conclusions of law are accepted by the Court, the Commission, as receiver, shall pay the above claims from the grain dealer's bond on a pro rata basis. Accumulated interest on the grain dealer's bond for the bonding period of July 1, 1999, through June 30, 2000, shall be distributed on a pro rata basis to the eligible claimants of the bond proceeds.

Dated at Pierre, South Dakota, this 7th day of November, 2002.

<p align="center"><b>CERTIFICATE OF SERVICE</b></p> <p>The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.</p> <p>By: _____</p> <p>Date: _____</p> <p align="center">(OFFICIAL SEAL)</p>
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BY ORDER OF THE COMMISSION:

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JAMES A. BURG, Chairman

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PAM NELSON, Commissioner

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ROBERT K. SAHR, Commissioner